Supreme Court, U. S.
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IN THE

Supreme Court of the United States

October Term, 1976

No. .....
76-1240

RAM TEJ WANEY,
Petitioner,

v.

UNITED STATES OF AMERICA,
Respondent.

PETITION FOR WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE NINTH COURT

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PETITION FOR WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE NINTH COURT

The petitioner, Ram Tej Waney, respectfully prays that a Writ of Certiorari be issued to review the Opinion and Judgment of the United States Court of Appeals for the Ninth Circuit entered in the above-entitled matter, Cause No. 76-2027, as of September 28, 1976.

I.
OPINION BELOW

The Memorandum Opinion of the U.S. Court of Appeals for the Ninth Circuit is printed in Appendix A (p. A-1).

II.
JURISDICTION

The Opinion and Judgment of the United States Court of Appeals for the Ninth Circuit was filed September 28, 1976. A Petition for Rehearing and suggestion for Rehearing En Banc was timely filed on October 8, 1976. A Supplemental Petition for Rehearing and Suggestion for Rehearing En Banc was filed with a Substitution of Counsel by a

second attorney on October 28, 1976. Both the original Petition for Rehearing and Supplemental Petition for Rehearing were denied by an Order dated November 24, 1976 and printed in Appendix B.

The special circumstances surrounding petitioner's request to make a late filing are that the Order dated November 24, denying both Petitions for Rehearing was not served by the Court of Appeals on petitioner's then attorney of record.

This was due to an inadvertent error on the part of the clerk's office of the Court of Appeals. Consequently, petitioner and his counsel of record remained uninformed of the denial of the Petition for Rehearing until approximately February 10, 1977.

On February 22, 1977 the Court of Appeals by Order printed in Appendix C granted appellant-petitioner's emergency motion and request for stay of execution of sentence pending application to the Supreme Court by Petition for Writ of Certiorari.

On February 24, 1976, a copy of the Order denying Petition for Rehearing was served on petitioner's then attorney of record.

The jurisdiction of this Court is invoked under 28 U.S.C. §1254.

III.
QUESTION PRESENTED

Whether a trial judge should disqualify himself on defendant's motion when the judge allowed withdrawal of a guilty plea only on the condition that the Court would not allow any subsequent plea bargaining.

IV.
CONSTITUTIONAL AND STATUTORY PROVISIONS INVOLVED

The constitutional provision involved is the Fifth Amendment of the Constitution of the United States. The statutes involved are Title 28 U.S.C. §144 and 28 U.S.C. §455(a) and (b)(1). Also involved is Federal Rule of Criminal Procedure 11. Each of the authorities is set forth verbatim in Appendix D.

V.
STATEMENT OF THE CASE

A. Procedural Background

Petitioner was indicted in the Western District of Washington and charged with four counts of violation of 18 U.S.C. §1014. A plea of guilty was entered as to one of the counts. Subsequently, the guilty plea was withdrawn and the defendant was allowed to enter a plea of not guilty as to each count.

Jury trial commenced in March, 1976. Following a verdict of guilty as to each count an appeal was taken resulting in the opinion and judgment that petitioner now asks this Court to review.

B. Factual Background

The facts salient to the submission of this petition are as follows:

1. On January 30, 1976 following entry of a plea of guilty pursuant to a negotiated plea bargain, petitioner requested that the trial court allow a withdrawal of guilty plea.

2. At the time of the hearing on the motion to allow

withdrawal of guilty plea the trial judge stated to the petitioner that if said withdrawal of plea were allowed, the court would not allow any further plea negotiation in this case. The court further indicated that the defendant's sole choices would be to plead guilty as to all counts or go to trial. The court further indicated that if the defendant were to be convicted on more than one count the court might sentence him consecutively on each count. The motion to withdraw the guilty plea was then granted by the court.

3. Subsequent to this hearing and prior to trial the defendant moved to disqualify the trial judge from further proceedings in this case. The basis of this motion was an affidavit wherein the defendant recited his belief that the judge had already made up his mind to sentence the defendant to prison. Said request for disqualification was denied.

VI.
REASONS FOR GRANTING THE WRIT

A. This Case Involves a Question of Exceptional Importance to the Concept of Due Process of Law (U.S. Const. amend. V)

1. *The Question Presented Regarding the Propriety of a Federal Trial Judge to Refuse to Allow Plea Bargaining Has Not Been Previously Addressed by This Court.*

The question presented in this case is whether a federal trial judge in a criminal prosecution may be permitted to notify each of the parties in advance of trial that no plea bargaining will be accepted by the Court following withdrawal of a guilty plea.

The practice of disposing of criminal charges by agreement between the prosecutor and the accused, called "plea

bargaining", has been strongly approved by this Court. *Santobello v. New York*, 404 U.S. 257, 30 L. Ed. 2d 427, 92 S. Ct. 495 (1971); *see also, Brady v. United States*, 397 U.S. 742, 25 L. Ed. 2d 747, 90 S. Ct. 1463 (1970); *Chaffin v. Stynchcombe*, 412 U.S. 17, 36 L. Ed. 2d 714, 93 S. Ct. 1977 (1973).

This Court in *Santobello v. New York* cited certain safeguards and standards that must be adhered to in order to insure fairness in the "plea bargaining" process, Fed. R. Crim. P. 11, governing pleas in federal courts requires the judge be satisfied that a factual basis for the plea exists before a guilty plea may be accepted. Furthermore, the plea must be voluntary and knowing not improperly induced by false promises. *Id.* at 261, 30 L. Ed. 2d 432-433.

Most relevant to the present case is the affirmance in *Santobello v. New York* that there is no absolute right of a defendant to have a guilty plea accepted. In accordance with Fed. R. Crim. P. 11, the trial court may reject or accept a plea "in exercise of sound judicial discretion". *Id.* at 262, 30 L. Ed. 2d 433; Fed. R. Crim. 11.

In the present case the trial judge prevented in advance of trial any further plea bargaining from taking place. It is herein asserted that the judge acted improperly by adopting a fixed attitude with regard to the possibility of a negotiated plea. Plea bargains may result from any number of individualized factors. The role of the trial judge is to accept or reject a guilty plea using sound discretion in considering all of the factors involved. In the present case, the trial judge indicated in effect that the court would not exercise judicial discretion in considering a plea negotiation. It is herein asserted that by such action the trial court is abrogating its responsibility to be fair and impartial in

ruling on the proceedings before it and is, in effect, prejudging any motion or request for acceptance of a negotiated plea.

This issue arose by way of defendant's pre-trial motion, made in accordance with Title 28 U.S.C. §144 and 455(a), requesting that the judge disqualify himself from all further proceedings in this case.

Adopting a fixed attitude regarding further plea negotiation is analogous to adopting a fixed attitude regarding sentencing prior to the hearing of evidence. In *United States v. Thompson*, 483 F.2d 527 (3d Cir. 1973) the Third Circuit held that the trial judge should have disqualified himself after he said in a pretrial statement that all Selective Service violators will receive thirty month sentences. The basis for the holding is that by adopting a fixed view as to sentencing, the court is failing to fulfill its responsibility to exercise discretion in determining sentences based on the individualized circumstances of each defendant. It was therein determined that by such action the trial judge showed a personal bias against that class of persons charged with violating Selective Service laws.

This case presents the question of whether a trial judge may rule in advance or take a fixed position in advance regarding an issue requiring exercise of judicial discretion. It is submitted that this Court should grant this Writ in order that a ruling may be forthcoming on this important question.

2. *This Court in Supervision Over the Federal Judiciary Should Clarify the Scope of Review to be Followed in Application of 28 U.S.C. § 455.*

The factual basis required for disqualification of judges was amended by passage of 28 U.S.C. § 455(a) in 1974. The

new statute provides that a judge shall disqualify himself in any proceeding in which his impartiality might reasonably be questioned.

In the present case the Ninth Circuit based its decision on the conclusion that defendant's "affidavit of prejudice did not set forth facts sufficient to require the district court to recuse itself".

It is questionable whether an appellate court is limited to the affidavit of prejudice in determining whether a judge should have disqualified himself. Title 28 U.S.C. §144 does contain specific procedural provisions requiring the filing of such an affidavit. Arguably, consideration of a motion for disqualification made under this statute is limited to the legal sufficiency of the facts presented by affidavit.

A determination under 28 U.S.C. §455(a) (1974), however, should not be so limited. Section 455 is wholly silent about procedures. It appears that in the present case the Ninth Circuit limited its consideration to those facts submitted only in the affidavit of prejudice.

Recently, in *United States v. Ritter*, 540 F.2d 459 (10th Cir. 1976) the Tenth Circuit looked beyond the affidavit submitted to all surrounding facts in ruling that a judge who presided at a civil anti-trust trial should not sit at the companion criminal trial. The court held that their determination was to be made "in the light of the total facts and viewing the future of this case in the light of Section 455(a)".

It is herein submitted the Ninth Circuit should not have limited its review as it did. In accordance with the intended broad scope of §455 the court must look beyond an affidavit submitted pursuant to 28 U.S.C. §144. This apparent con-

flict posed by the decision of the Ninth Circuit below and the Tenth Circuit decision should be addressed by this Court, and the issue answered, to assist the federal appellate courts in their future determinations under this new section.

VII.
CONCLUSION

For the foregoing reasons, the Petition for Writ of Certiorari should be granted.

Respectfully submitted,

ALAN C. ALHADEFF
Attorney for Petitioner

APPENDIX A

UNITED STATES COURT OF APPEALS
FOR THE NINTH CIRCUIT

UNITED STATES OF AMERICA, *Plaintiff-Appellee,* vs. RAM TEJ WANEY, *Defendant-Appellant.*	No. 76-2027 MEMORANDUM

[September 28, 1976]

Appeal from the United States District Court
Western District of Washington
at Seattle

Before: KOELSCH and HUFSTEDLER, Circuit Judges, and JAMESON,* District Judge.

Waney's affidavit of prejudice did not set forth facts sufficient to require the district court to recuse itself or to require a hearing thereon before a different judge. The district court's comments that Waney could not count very heavily on his continued employment because of a likelihood that he would be sentenced to prison were made in the context of proceedings after Waney had entered a guilty plea.

When a judge tells a defendant who has been convicted after trial that a prison sentence is likely, his statement cannot reasonably cast any doubt upon the judge's impartial-

*Honorable William J. Jameson, Senior United States District Judge, District of Montana, sitting by designation.

ity, despite the defendant's distress about the prediction. The only difference between that case and this one is that the comments were made after a guilty plea instead of after trial.

Waney's argument amounts to this: A district judge who has expressed any view on sentencing after taking a guilty plea, should be presumed to have cast doubt upon his impartiality, thereby disqualifying himself from trying the case if the defendant thereafter withdraws his plea. We do not believe that such a presumption is permissible, as a matter of fact or of law.[1]

We reject Waney's contention that he was entitled to notice that the banks he was deceiving were federally insured. Federal insurance is simply a requisite to federal jurisdiction. (*Cf. United States v. Howey* (9th Cir. 1970) 427 F.2d 1017.)

Hawkins' testimony about his conversation with a person who identified himself as "Sharp" was hearsay unless "Sharp" was, in fact, Waney. Circumstantial evidence indicated that Waney and the person who called himself "Sharp" were the same person. Evidence extrinsic to the conversation showed that "Sharp" was a fiction of Waney's creation and "Sharp's" glowing testimonials about Waney during the conversation supplied added evidence that "Sharp" was Waney under an assumed name.

AFFIRMED.

[1]We do not imply that it is undesirable to have a different judge try the case when a guilty plea has aborted.

APPENDIX B

UNITED STATES COURT OF APPEALS
FOR THE NINTH CIRCUIT

UNITED STATES OF AMERICA, *Plaintiff-Appellee,* v. RAM TEJ WANEY, *Defendant-Appellant.*	No. 76-2027 ORDER

[Filed Nov. 24, 1976]

Before: KOELSCH and HUFSTEDLER, Circuit Judges, and JAMESON,* District Judge.

The panel as constituted in the above case has voted to deny the petition for rehearing and Judges Koelsch and Hufstedler have voted to reject the suggestion for a rehearing en banc.

The full court has been advised of the suggestion for an en banc hearing, and no judge of the court has requested a vote on the suggestion for rehearing en banc. Fed. R. App. P. 35(b).

The petition for rehearing is denied and the suggestion for a rehearing en banc is rejected.

The supplemental petition for rehearing is denied and the suggestion therein for rehearing en banc is rejected.

*Honorable William J. Jameson, Senior United States District Judge, District of Montana, sitting by designation.

APPENDIX C

UNITED STATES COURT OF APPEALS
FOR THE NINTH CIRCUIT

UNITED STATES OF AMERICA, *Plaintiff-Appellee,* vs. RAM TEJ WANEY, *Defendant-Appellant.*	No. 76-2027 DC # CR 75-267V

ORDER FOR STAY OF EXECUTION
OF SENTENCE

Before: HUFSTEDLER, Circuit Judge.

Appellant's motion for stay of execution of his sentence is granted on the same terms as to bail that were in force during the pendency of the trial.

The stay shall be in effect pending the determination of appellant's application for a petition for certiorari, provided such petition is filed in the Clerk's Office of the Supreme Court of the United States on or before March 4, 1977. In the event the petition for writ of certiorari is granted, then this stay is to continue pending the final disposition of the case by the Supreme Court of the United States.

APPENDIX D

Fifth Amendment to the Constitution of the United States:

> No person shall be held to answer for a capital or otherwise infamous crime, unless on a presentment or indictment of a grand jury, except in cases arising in the land or naval forces, or in the militia, when in actual service in time of war or public danger; nor shall any person be subject for the same offense to be twice put in jeopardy of life or limb, nor shall be compelled in any criminal case, to be a witness against himself; nor be deprived of life, liberty or property, without due process of law; nor shall private property be taken for public use without just compensation.

Title 28 United States Code, Section 144.

§ 144. *Bias or prejudice of judge*

Whenever a party to any proceeding in a district court makes and files a timely and sufficient affidavit that the judge before whom the matter is pending has a personal bias or prejudice either against him or in favor of any adverse party, such judge shall proceed no further therein, but another judge shall be assigned to hear such proceeding.

The affidavit shall state the facts and the reasons for the belief that bias or prejudice exists, and shall be filed not less than ten days before the beginning of the term at which the proceeding is to be heard, or good cause shall be shown for failure to file it within such time. A party may file only one such affidavit in any case. It shall be accompanied by a certificate of counsel of record stating that it is made in good faith.

Title 28 United States Code, Section 455(a) and (b)(1):

§ 455. *Disqualification of justice, judge, magistrate, or referee in bankruptcy*

(a) Any justice, judge, magistrate, or referee in bankruptcy of the United States shall disqualify himself in any proceeding in which his impartiality might reasonably be questioned.

(b) He shall also disqualify himself in the following circumstances:

(1) Where he has a personal bias or prejudice concerning a party, or personal knowledge of disputed evidentiary facts concerning the proceeding;